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NO. 82-598

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

IRA T. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

DID THE INDICTMENT ALLEGE AND DID THE EVIDENCE ESTABLISH A FEDERAL OFFENSE UNDER 18 U.S.C. 2314 AND 2315 SO AS TO CONFER JURISDICTION UPON THE DISTRICT COURT WHERE THE JURISDICTIONAL $5,000 VALUE OF STOLEN PROPERTY WAS BASED UPON THE AGGREGATION OF 46 ITEMS ALLEGEDLY STOLEN OVER A FOUR-YEAR PERIOD FROM 25 DIFFERENT STORES IN 13 DIFFERENT CITIES AND NINE DIFFERENT STATES, WERE NOT ALL STOLEN BY THE SAME PERSON OR SOLD TO THE PETITIONER BY THE SAME PERSON, AND WHICH WERE NOT ALL TRANSPORTED OR RECEIVED BY PETITIONER AT THE SAME TIME?

II.

WHERE THE PRINCIPAL WITNESS AGAINST THE PETITIONER WAS AN ADDICT ACCOMPLICE

SHOULD THE TRIAL COURT INSTRUCT, WHEN REQUESTED TO DO SO, AS TO THE WEIGHT AND EFFECT THAT MAY BE GIVEN TO THE TESTIMONY OF SUCH A WITNESS?

III.

WHERE OFFICERS DURING THE EXECUTION OF A SEARCH WARRANT PERFORM A GENERAL EXPLORATORY SEARCH INCLUDING PHOTOGRAPHING OF ITEMS NOT THEN SEIZED, AND IS IN FACT A SHAM TO OBTAIN PROBABLE CAUSE FOR THE ISSUANCE OF A SECOND SEARCH WARRANT, SHOULD THE FRUITS OF BOTH SEARCHES BE SUPPRESSED?

A. SHOULD THE COURT OF APPEALS HAVE DECLINED TO PASS UPON THE REASONABLENESS AND LAWFULNESS OF THE SEARCHES BECAUSE THE SPECIFIC ATTACK MADE WAS NOT RAISED IN THE PETITIONER'S PRE-

TRIAL MOTION TO SUPPRESS, EVEN THOUGH THE ATTACK WAS MADE DURING TRIAL AND IN THE POST-TRIAL MOTION?

OTHER PARTIES INVOLVED

There were no other parties to this proceeding.

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OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit, a copy of which is attached hereto as Appendix "A", is not yet reported.

There was no written opinion by the United States District Court for the District of Kansas.

Attached hereto as Appendix "B", is a copy of the Order of the United States Court of Appeals for the Tenth Circuit staying the issuance of a mandate until September 9, 1982, pending certiorari.

Attached hereto as Appendix "C" is Order Denying Rehearing on July 27, 1982.

STATEMENT OF GROUNDS FOR JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Tenth Circuit was entered on July 6, 1982, affirming the Petitioner's

conviction and sentence in the United States District Court for the District of Kansas upon two felony criminal charges. A timely Petition for Rehearing was filed in the Court of Appeals and was denied and overruled on July 27, 1982.

This Petition for Writ of Certiorari is filed within 60 days of the Order denying Petitioner's Petition for Rehearing, and is therefore timely under the provisions of Rules 20.1 and 20.2 of this Court

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Fifth Amendment to the United States Constitution:

"No person shall... be deprived of life, liberty, or property, without due process of law;..."

Sixth Amendment to the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him;..."

United States Code, Title 18:

Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
..."

Section 2311:

"As used in this chapter:...
'Value' means the face, par or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

Section 2314:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;...
Shall be fined not more than $10,000 or imprisoned not more than ten years, or both..."

Section 2315:

"Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more... moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken;...
Shall be fined not more than $10,000 or imprisoned not more than ten years, or both..."

Federal Rules of Criminal Procedure:

Rule 7 (c) (1):

"In General. The indictment or the the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged..."

Rule 8 (a):

"Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Rule 12 (b)

"Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:...
(3) Motions to suppress evidence:..."

Rule 12 (f):

> "Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

Rule 41 (f):

> "Motion to Suppress: A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."

Rule 52:

> "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

Petitioner, a 63-year old medical doctor and the Defendant below was indicted on two counts on January 28, 1981, in the United States District Court for the District of Kansas. In Count I it was charged that he "(From on or about January 1, 1977, to on or about the date of filing of this indictment...) did receive, conceal and store (46 specifically described items of art and collectibles) of a value of $5,000 or more, which constituted, and were a part of, interstate commerce, and the (defendant) knew said property to have been stolen... in violation of 18 U.S.C. 2315. In Count II Petitioner alone was charged with conspiring with unnamed persons, in violation of 18 U.S.C. 371, to commit the offense of interstate transportation of stolen goods of a value of $5,000 or more knowing the same to be stolen in violation of 18 U.S.C. 2314.

A jury trial resulted in the conviction of Petitioner on both counts, and on June 22, 1981, he was sentenced to two years imprisonment on both counts, to be served concurrently, and to pay a fine of $10,000 on each count. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed his conviction on July 6, 1982.

The evidence against Petitioner consisted of items seized from his home as a result of two search warrants, and the testimony of Marvin Gabb (a/k/a/Marvin Stevens). Gabb was a 41-year old four time convicted felon who had been a narcotics addict and shoplifter since he was age 17 to 18, concentrating on the theft of clothing and works of art and collectibles. Gabb and his wife's narcotic habits were financed by their thefts. Gabb testified he had the "largest heroin habit" in Kansas City, Missouri, and that he also

had a methadone habit. He testified his last dose of drugs was on the Saturday before trial commenced and during his testimony he said he was feeling a little bad from his withdrawal. Gabb testified his and his wife's habit cost between $700 to $1,000 a day. In order to secure Gabb's testimony against Petitioner, the Government "negotiated" an agreement with him by the terms of which he was granted immunity as to all his nonviolent crimes and the Government agreed to "assist" Gabb and his wife on pending state charges. They were both placed in the Federal Witness Protection Program, were relocated, their identities changed, and they were paid $900 per month.

Gabb testified he and other shoplifters sold their goods to his half-brother, Jerry Stevens, who operated a place of business that sold clothes and art objects. Petitioner was a customer of the

store. Gabb met Petitioner through Jerry Stevens, and when Jerry started having "cash flow" problems Gabb started selling his goods directly to individuals, including Petitioner. Gabb testified he had told the Petitioner the items were stolen. Petitioner insured the specific items, tagged some of them as to when, who from and how much he had paid for the items, and kept many of them on open display in his home. Petitioner testified he did not know the items were stolen and that he was a collector who had thousands of such items.

Gabb identified, during his testimony, some of the items as being similar to items that had been stolen by him. He positively identified a few items. He identified other items as having been sold by him to Jerry Stevens. Other items were not mentioned by Gabb in his testimony.

As a result of surveillance of Gabb by the

F.B.I. and local Missouri Police Petitioner was observed buying an item from Gabb in a parking lot. Gabb and his wife were eventually arrested and charged locally. F.B.I. Agent Weber attempted to elicit Gabb's cooperation against the Petitioner (a medical doctor). On September 18, 1980, a federal search warrant was executed at Petitioner's home in Overland Park, Kansas. This warrant listed four specific items, none of which were found. During the service of this warrant 35 items not listed on it were seized. Numerous other items were removed to the garage where they were photographed. Agents testified regarding the search and described Petitioner's home as looking like a museum.

After the publicity of this search Gabb realized he was in trouble because he, according to his testimony, knew Petitioner would tell where he bought the items. Gabb therefore agreed to

cooperate with the F.B.I. against Petitioner. The items seized and the photographs of the other items were shown to Gabb. A second search warrant was then executed at Petitioner's home on October 9, 1980, and 96 items were seized. These items were still on display. Petitioner was only charged with 46 items, and not all of them were identified as being stolen.

Prior to trial Petitioner filed a motion to dismiss attacking the jurisdiction of the Court and attacking the Indictment for failing to allege a federal offense and as being duplicitious. These attacks were renewed in his part during the trial motions for acquittal and in his post-trial motion.

Petitioner also filed a pre-trial Motion for Bill of Particulars, which was denied; and a pre-trial Motion to Suppress attacking the two search warrants and the searches and seizures. This motion attacked the execution of the

warrants by Missouri state law enforcement officers while in the State of Kansas. This motion was denied. During trial Petitioner attempted to make inquiry into other aspects of the legality of the two searches but the Government's objections thereto were sustained. In Petitioner's post-trial motion he attacked the searches on the basis that the first search warrant was a sham in order to gain access to Petitioner's home so as to conduct a general exploratory search and to thereby obtain probable cause for the second search warrant. Petitioner objected to the introduction of the exhibits during trial because of the unlawfulness of the search and seizure. The Tenth Circuit Court of Appeals refused to pass upon this issue because it had not been raised in Petitioner's pre-trial motion to suppress.

ARGUMENT

This proceeding involves important questions of federal law which have not been definatively determined by this Court, but that should be so as to establish a guide to the lower Courts.

I.

JURISDICTIONAL AMOUNT

The Indictment attempted to allege violations of 18 U.S.C. 2314 and 2315 by lumping together 46 items which the evidence established were stolen (not all by the same person) from 25 different stores, in 13 different cities in nine different states, over at least a four-year period, so as to satisfy the $5,000 jurisdictional requirement. The evidence clearly established that they were stolen at different times, transported at different times, and received by the Petitioner at different times, and not always by or from the same person. If the jurisdictional amount is not

satisfied the offense, or offenses, are state and not federal crimes. United States vs. Nall, (5th Cir. 1971) 437 F.2d 1177.

The usual situation involves the converse of the present case, that is, where the Government has alleged as separate counts multiple items, and it is the defendant that is claiming there should only have been one count. The Courts then seem to speak of "units of prosecution." See Bell vs. United States, 349 U.S. 81, 75 S. Ct. 620 (1955); Castle vs. United States, 368 U.S. 13, 82 S. Ct. 123 (1966) reversing 287 F.2d 657 (5th Cir. 1961); Gilinsky vs. United States, (9th Cir. 1966) 368 F.2d 487. In Asner vs. United States, (8th Cir. 1966) 367 F.2d 803, the defendant was charged in four counts with four checks all passed on the same day but at four different places. The Court there distinguished Castle in that the defendant there released

personal control over the four checks separately before they may have traveled in interstate commerce. Asner relied upon the test for determining whether there is an identity of offenses of "whether the same evidence is required to sustain them." In our present case this test when applied does not support a single offense jurisdiction.

The question then is, does 18 U.S.C. 2311 satisfy the "value" jurisdictional requirement. That statute provides, in part, that "the aggregate value of all goods... referred to in a single indictment shall constitute the value thereof." Does this statute authorize a conviction of a federal offense by the mere allegation of an essential element, or must the Government still prove that element? Federal jurisdiction cannot be established in a criminal case by mere accusation. Due process must require something

more in the way of evidence. If the indictment alleges the aggregate value as being $5,000 but the proof only established a value of $25 would 18 U.S.C. 2311 satisfy the jurisdictional element?

In Schaffer vs. United States, 362 U.S. 511, 80 S. Ct. 945, rehearing denied 363 U.S. 858, 80 S. Ct. 1605 (1960), affirming 266 F.2d 435 (2nd Cir. 1959), the defendants, who were garment store owners, had a standing agreement with a Tony Stracuzza, who had a deal with various truck drivers to turn over to him clothing that was being shipped. At loc. cit. 517 949, this Court said, "A sensible reading of the statute (18 U.S.C. 2311) properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated."

Petitioner would now suggest that this

Court should take the next step and pass upon the issue herein presented. Gabb and Petitioner were dealing at arms length. Gabb was selling his stolen goods to other persons, wherever he could get the best price. Petitioner did not buy everything offered to him. Indeed, as to some items Gabb testified he sold them to Jerry Stevens, and they later ended up in Petitioner's house. There was no plan or agreement by which Petitioner would buy all, or any part, of Gabb's stolen goods. It has long been held that the relationship of buyer and seller does not establish a conspiracy between them. See United States vs. Falcone, 311 U.S. 205 (1940); and United States vs. Varelli, (7th Cir. 1969) 407 F. 2d 735.

There has been much discussion recently about creeping federalism. In the present proceeding the Government has attempted to make numerous separate state offenses into one giant

federal case. If this approach is approved, then every "fence" will be punishable under federal law. Where is the break-off point? If a four-year spread is approved, would a 40-year spread be acceptable?

II.

NARCOTICS ADDICT INSTRUCTION

Petitioner requested that the trial Court give an instruction, in the form suggested by Devitt and Blackmar, Federal Jury Practice and Instructions, (3rd Edition), Section 17.03. This Requested Instruction (No. 6) was as follows:

> "If an accomplice is also a narcotics addict, there are additional reasons why his testimony should be considered with great care. An addict has a constant need for a supply of drugs and for money to support his habit, and also may have abnormal fear of imprisonment in which his supply of drugs might be cut off. These are special circumstances which you may consider in weighing

> testimony of this kind. You of course may give the testimony such weight as you think proper, after considering all relevant circumstances."

The District Court refused to give this instruction, or any one upon the same subject, and Petitioner objected to this refusal. The trial court did give an accepted instruction on an accomplice, a witness granted immunity, a felony conviction, and a general stock credibility instruction. All of these instructions applied to Gabb. However, Gabb admitted he stole to feed his narcotics habits, that he was still using drugs. He also testified his previous convictions came about as the result of his need for money to buy narcotics. He had previously been in the penitentiary, his probation having been revoked because of his use of drugs, and when he got out he returned to drugs.

Agent Weber, a self-proclaimed expert

on drug matters, testified addicts are generally liars, that they are "very vulnerable as informants because they will do anything to stay close to the narcotics," and that addicts do not want to go to prison where they can't get drugs. Gabb in his testimony agreed he did not want to go to prison and testified he was amazed the Government wanted Petitioner and was willing to turn him loose.

Without Gabb's testimony no case was or could have been made against Petitioner, and he knew who the Government was after before he negotiated his deal with the agents.

The requested instruction has been approved. In United States vs. Griffin, (6th Cir. 1967) 382 F.2d 823, the Sixth Circuit Court of Appeals reversed for failure to give such an instruction holding that it was plain error. In Government of Virgin Islands vs. Hendricks,

(3rd Cir. 1973) 476 F. 2d 776, 779, the Third Circuit held that such an instruction should be given if requested, but declined to reverse as plain error where the informer-addict was corroborated. See also United States vs. Kinnard, 150 U.S. App. D.C. 386, 465 F. 2d 566 (1972) and United States vs. Cooper, (5th Cir. 1972) 472 F. 2d 1017, cert. denied, 411 U.S. 983 (1973).

The Tenth Circuit Court of Appeals in its Opinion below held that such an instruction, even when requested, need not be given. Thus there is a conflict of opinion in the various Courts of Appeal.

In its Opinion below the Tenth Circuit held that the other credibility instructions sufficiently alerted the jury to consider Gabb's testimony with special care, and that the matter was explored extensively in the testimony. Of course, the matter was brought out in testimony. If it had not

been, no such instruction would have been required. The Court instructed upon certain matters effecting credibility but not upon the most important one in our present case, Gabb's addiction. The average juror may not have much knowledge about narcotics other than what he hears on television and may very well not be familiar with the horrors of withdrawal and possible unavailability of drugs in the mind of an addict. Where, as here, the Court failed to instruct on addict, but did on other factors (prior conviction, immunity, accomplice) the jury might well have understood that the Court, by its silence on the matter, was saying addiction was not a factor.

The conflict in the opinions of the Circuits should be laid to rest, and this Court should establish guidelines for the lower courts.

III.

SEARCH AND SEIZURE

The Court of Appeals in its Opinion refused to pass up Petitioner's attack upon the two searches and seizures because the specific attack, although made by way of objection during the trial (after the evidence revealed that the first search warrant was a sham) and during his post-trial motion. The basis for this ruling was that Federal Rules of Criminal Procedure Rule 12 (b) (3) and (f) provides for the "orderly proceeding during the trial of a case by eliminating from the trial disputes over police conduct not immediately relevant to the question of guilt."

The Petitioner did not deliberately by-pass that issue, but raised the issue upon learning during the trial that the basis for objection existed. The trial court certainly abused its discretion in not allowing Petitioner to inquire further into the

matter. In Petitioner's Petition for Rehearing filed in the Court of Appeals he sought an alternative Order remanding the proceeding to the District Court for a hearing on the issue raised in his attack.

The trial evidence revealed that the police when conducting the first search (for four items that were not found) photographed numerous items that were not seized for the purpose of later trying to establish that they were stolen. The search lasted six and one-half hours and during it officers (allegedly searching for four relatively large art objects) unrolled a rolled up paper (thus discovering and seizing Exhibit 2, a lithograph); opened a small drawer, found a daily diary, looked inside it, read it and seized it (Exhibit 49); interrogated Petitioner regarding his acquisition of numerous items; and seized 35 items not listed on the

warrant (Exhibits 1 through 9 being 9 of those 35 - no charge was made as to the other 26 items seized).

As a direct result of that search a second search warrant was issued and 96 more items were seized (Exhibits 10 through 46 - no charge was made as to the other 60 items seized).

Prior to the first search Agent Weber had unsuccessfully tried to learn what was inside Petitioner's home.

The careful search, the seizing of items not listed on the warrant, and the photographing of other items for the purpose of later determining if they were stolen, hardly falls within the "inadvertent" requirement of a "plain view" seizure. In Coolidge vs. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, reh. denied 92 S. Ct. 26 (1971), it was held that in order for that doctrine to apply it must be immediately apparent

to the police that the item seized was connected with crime. See also Lo-Ji Sales, Inc. vs. New York, 442 U.S. 219, 99 S. Ct. 2319 (1979).

The overstepping by the officers in this case, as revealed during the trial, was far too outrageous and unacceptable to be approved by the expedient adopted by the Court of Appeals. This Court should examine this issue so as to establish a precedent regarding such searches.

The evidence against the Petitioner was weak, the essential criminal element (i.e.: knowledge) being established by the uncorroborated testimony of Marvin Gabb, and the constitutional error should not be held to be harmless.

CONCLUSION

Wherefore, Petitioner respectfully suggests and prays that a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, and that such judgment and opinion should be reversed and Petitioner be ordered discharged or a new trial be directed.

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7-6-82 81-1728

United States Court of Appeals
For the Tenth Circuit

SLIP OPINION

Appendix A

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United States Court of Appeals
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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

IRA T. SMITH,

Appellant.

No. 81-1728

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. Case No. 81-20012-01)

Robert G. Duncan, Kansas City, Missouri
(David Gilman, Overland Park, Kansas, with
him on the brief), for Appellant.

Amanda S. Meers, Assistant United States Attorney (Jim J. Marques, United States Attorney, and Vernon E. Lewis, Assistant United States Attorney, with her on the brief), District of Kansas of Kansas, Kansas City, Missouri, for Appellee.

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges.

McKAY, Circuit Judge.

Dr. Ira T. Smith was convicted in a federal district court jury trial of violating 18 U.S.C. § 2315 by receiving stolen goods, with a value of $5000 or more, which had been part of interstate commerce and which he knew to have been stolen. He was also convicted of violating 18 U.S.C. § 371 by conspiring to transport in interstate commerce stolen goods with a value of $5000 or more, a violation of 18 U.S.C. § 2314.

On appeal, Dr. Smith proffers five challenges to his convictions: (1) the federal district court lacked jurisdiction because the items of stolen property set forth in the indictment were improperly aggregated to reach the $5000 jurisdictional amount; (2) the trial court erred in its instructions to the jury concerning aggregation; (3) the trial court erred in refusing and failing

to instruct the jury that the testimony of an informant who is a narcotics addict is inherently unreliable and must be considered with great care; (4) the trial court erred in admitting hearsay testimony over objection; and, (5) his rights under the Fourth Amendment to the Constitution of the United States were violated. Following a recitation of the pertinent facts, we take up these challenges seriatim.

In 1980, law enforcement officials were conducting surveillance of Marvin Gabb, a drug addict who had been supporting his habit for more than twenty years by theft and other criminal activity. Mr. Gabb was observed meeting a man in a supermarket parking lot, who later was identified as Dr. Smith. When Mr. Gabb subsequently was arrested for theft by state and federal law enforcement officials, he implicated

Dr. Smith as a purchaser of goods that Dr. Smith knew to have been stolen. He agreed to cooperate with officials against Dr. Smith in exchange for immunity from prosecution as well as protection and compensation under the Federal Witness Protection Program. As a result of information supplied by Mr. Gabb, a federal search warrant was issued to search Dr. Smith's home. None of the four items listed in the warrant was found, but thirty-five other items not listed were seized, including a notebook, in which Dr. Smith had recorded his purchases of art objects. Numerous other items were photographed, and Dr. Smith was questioned. He denied knowing that any of the art objects was stolen. Following this search, Mr. Gabb examined the photographs and identified items that he had stolen. Identification also was made by some of the theft victims. A second federal search warrant was issued for

another search of Dr. Smith's home. Ninety-six objects were seized. Forty-six of the items taken in the two searches ultimately were listed in the indictment.

I. Jurisdiction

An essential element in either of Dr. Smith's convictions is that the property involved had a value of $5000 or more. Dr. Smith argues that it is improper to aggregate values to reach this jurisdictional amount and that at least one item must have a value of $5000 or more in order to constitute a federal offense. He does not dispute that the aggregate value of the items listed in the indictment was $5000 or more. With respect to these offenses, Congress has defined "value" as the "face, par, or market value, whichever is the greatest, and the aggregate value of all goods ... referred to in a single

indictment shall constitute the value thereof." 18 U.S.C. § 2311. The United States Supreme Court has interpreted this section to allow aggregation of the values of individual deliveries of stolen goods to reach the jurisdictional amount.

> (W)here the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated. The Act defines "value" in terms of that aggregate. The legislative history makes clear that the value may be computed on a "series of transactions."

Schaffer v. United States, 362 U.S. 511, 517 (1960).

It is clear that Mr. Gabb and Dr. Smith engaged in a series of transactions properly charged as a single offense. Accordingly, it was proper to aggregate the values of the items set forth in the indictment to reach the jurisdictional amount.

11. Jury Instruction on Aggregation

The trial court instructed the jury that the government had the burden of establishing beyond a reasonable doubt that the value of the property in question was in excess of $5000 and that "value" meant the "aggregate value of all goods, wares, and merchandise referred to in a single indictment." Record, vol. 1, at 47. Dr. Smith argues that a determination as to whether the values should be aggregated is for the jury to make and that it was error to instruct the jury to aggregate the values as a matter of law. We do not agree. The jury's task was to weigh the evidence received at trial concerning the value of each item which it concluded that Dr. Smith had received in violation of § 2315 or conspired to transport in violation of § 371 and 2314, and then to determine whether the aggregate value with respect to each

offense was $5000 or more. However, it was proper for the trial court to instruct the jury that, as a matter of law, the values of individual items should be aggregated to reach the jurisdictional amount. See Schaffer v. United States, 362 U.S. 511 (1960).

III. Addict Instruction

In his third challenge, Dr. Smith alleges that the trial court erred in refusing and failing to instruct the jury upon request that the testimony of a narcotics addict must be considered with great care and weighed with caution. Mr. Gabb's testimony was especially damaging to Dr. Smith because it established Dr. Smith's knowledge that he was receiving stolen goods. Dr. Smith requested the trial court to submit the following instruction to the jury:

If an accomplice is also a narcotics

> addict, there are additional reasons why his testimony should be considered with great care. An addict has a constant need for a supply of drugs and for money to support his habit, and also may have abnormal fear of imprisonment in which his supply of drugs might be cut off. These are special circumstances which you may consider in weighing testimony of this kind. You of course may give the testimony such weight as you think proper, after considering all relevant circumstances.

Record, vol. 1 at 26. Although the trial court refused this instruction, it did instruct the jury that the testimony of an accomplice "is always to be received with caution and weighed with great care," id. at 66, that the testimony of a witness who provides evidence against a defendant for pay or immunity "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness," id. at 67, and that the fact of conviction could be considered in determining the weight and credit to be given to the testimony of a felon. Id. at 68. A general

credibility instruction also was given. Id. at 69.

Most federal circuit courts of appeals have noted with approval special narcotics addict instructions, such as the one requested by Dr. Smith. See, e.g., United States v. Lee, 506 F.2d 111 (D.C. Cir. 1974), cert. denied, 421 U.S. 1002 (1975); United States v. Gregorio, 497 F.2d 1253 (4th Cir.), cert. denied, 419 U.S. 1024 (1974); Government of Virgin Islands v. Hendricks, 476 F.2d 776 (3d Cir. 1973); United States v. Collins, 472 F.2d 1017 (5th Cir. 1972), cert. denied, 411 U.S. 983 (1973); United States v. Kinnard, 465 F2d 566 (D.C. Cir. 1972). It is apparent from analysis of these and other cases that the determination of when an instruction is required turns on the particular facts of the case.

Some circuit courts have required such instructions in certain situations. In United

States v. Griffin, 382 F. 2d 823 (6th Cir. 1967), the court held that it was plain error for the trial court to fail to instruct the jury that the testimony of an informer who was a narcotics addict must be considered with care and weighed with caution. In Griffin, the addict's testimony was corroborated with respect to one defendant, but uncorroborated with respect to another. In Fletcher v. United States, 158 F. 2d 321, 322 (D. C. Cir. 1946), the court noted that "a drug addict is inherently a perjurer where his own interests are concerned ...." In Government of Virgin Islands v. Hendricks, 476 F. 2d 776 (3rd Cir. 1973), the court held that an addict instruction should be given when an informant-addict-witness was in the pay of the government, although different results might obtain if the witness' testimony were corroborated. Finally, in United States v. Kinnard, 465 F. 2d 566 (D. C. Cir. 1972), the court

held that an addict instruction was necessary where "the testimony of the addict-informant (was) uncorroborated in some material respect." Id. at 572.

Other circuit courts have held that the failure to give an addict instruction does not necessarily constitute reversible error. In United States v. Hopkins, 518 F2d 152 (3rd Cir. 1975), the court held that the defendant was not prejudiced by the trial court's failure without objection at trial to give an addict instruction, because other cautionary instructions were given, and the issue of the credibility of the addict witness was exhausted during testimony. In United States v. Gregorio, 497 F. 2d 1253 (4th Cir.), cert. denied, 419 U.S. 1024 (1974), the court held that cautionary instructions on accomplices, informers, and immunity were adequate to emphasize

the care with which the jury should regard and weigh the testimony of an addict witness, at least when his testimony was corroborated. The Ninth Circuit also would affirm a conviction when no addict instruction was given where the fact of present addiction was not established and the testimony was corroborated, United States v. Tousant, 619 F2d 810, 812 (9th Cir. 1980).

In our view, Dr. Smith was not legally prejudiced by the refusal and failure of the trial court to give an addict instruction. The instructions to the jury on accomplice, immune informant, and felon testimony, along with the general credibility instruction, were sufficient to alert the jury to consider with special care and weigh with caution the testimony of Mr. Gabb. Moreover, the issue of Mr. Gabb's addiction was explored extensively during testimony.

We hasten to add, however, that normally the trial court runs a substantial risk of causing prejudice to a fair trial when it fails to instruct the jury concerning the inherent unreliability of an addict's testimony. As a general rule, prudence dictates the giving of an addict instruction whenever the prosecution has relied upon the testimony of a narcotics addict. The refusal to give the instruction in this case was not error only because the instructions pointed out other indicia of unreliability sufficient to alert the jury that Mr. Gabb's testimony must be considered with unusual care.

IV. Admission of Hearsay

Dr. Smith argues that the trial court's admission of certain hearsay evidence requires reversal of his conviction and grant of a new trial. He cites the trial court's admission over

objection of portions of the testimony of Bonnie Lee Stahnke, Gary Jenkins, and James K. Weber as reversible error.

Ms. Stahnke was assistant security manager for a Neiman-Marcus store from which several of the art objects found in Dr. Smith's home were stolen. She testified that she verified the theft of these objects and the price of each by inquiring of sales clerks at the store. The trial court denied Dr. Smith's objection to the admission of this testimony as hearsay, but the government later withdrew its offer of these exhibits and they were deleted from the indictment prior to the jury's deliberation.

Officer Jenkins was a Kansas City, Missouri, police officer. He observed Mr. Gabb meeting with a man of the same general description as Dr. Smith. He noted the second man's

automobile license number, initiated a check through the license bureau, and was advised that the automobile was registered to Dr. Smith. However, Dr. Smith admitted in his testimony that he met Mr. Gabb on that occasion at that location.

FBI Agent Weber's testimony relied on the statements of others to establish that certain art objects found in Dr. Smith's possession or shown or offered to him were stolen goods. However, the fact that those items still listed in the indictment at the time of the jury's deliberation were stolen was established by other undisputed evidence.

Assuming that this challenged testimony of Ms. Stahnke, Officer Jenkins and Agent Weber was inadmissible hearsay, its admission was not prejudicial, because no substantial right of Dr. Smith's was affected. Fed. R. Crim. P. 52 (a).

Indeed, the admission of this testimony, if erroneous, was error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 1967.

V. Search and Seizure

Dr. Smith asserts that the items seized at his home pursuant to two search warrants and introduced into evidence should have been suppressed at trial.

Rule 12 (b) (3) of the Federal Rules of Criminal Procedure requires that a motion to suppress evidence under Rule 41 (f) be made before trial. Rule 12 (f) provides that failure to make such a motion constitutes waiver, but provides that the court may grant relief from the waiver for cause shown.

Dr. Smith filed a timely pre-trial

suppression motion on the ground that state law enforcement officials were present at the execution of a federal search warrant. The trial court denied this motion. Later at trial, Dr. Smith raised his suppression argument by objection and by post-verdict motion for acquittal or judgment n.o.v., or, in the alternative, for a new trial, asserting that the first search was unlawful because it was exploratory or general and thus tainted the second search. The trial court admitted the challenged evidence over objection and denied the post-verdict motion. "The purpose of the rule requiring that motions to suppress be made prior to trial is to provide orderly proceeding during the trial of a case by eliminating from the trial 'disputes over police conduct not immediately relevant to the question of guilt.'" Mesmer v. United States, 405 F.2d 316, 318-19 (10th Cir. 1969) (citing Jones v. United States,

362 U.S. 257, 264 (1960). We find in the record no evidence that Dr. Smith lacked the opportunity to make his motion in a timely manner, and we do not think that the trial court abused its discretion in concluding that Dr. Smith had waived the right to raise the argument at a later time. The trial court might have found that the waiver should be set aside for good cause, but it did not, and, on these facts, we will not disturb the trial court's exercise of its discretion.

AFFIRMED.

JULY TERM - August 10, 1982

Before Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable Monroe G. McKay, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 81-1728
IRA T. SMITH, Defendant-Appellant.	)	

This matter comes on for consideration of appellant's motion for stay of mandate in the captioned cause pending application to the Supreme Court for certiorari.

Upon consideration whereof, it is ordered that the mandate shall be stayed until September 9, 1982, pending certiorari, and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

JULY TERM - July 27, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 81-1728
	)	
IRA T. SMITH,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued

and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By

Robert L. Hoecker
Chief Deputy Clerk

CERTIFICATE OF SERVICE

I, Robert G. Duncan, a member of the Bar of this Court, state that I did cause this Petition for Writ of Certiorari to be mailed, postage prepaid, to the Clerk of the Supreme Court, Supreme Court Building, Washington, D. C. 20543, on this 24th day of September, 1982. I further state that upon said date I did further cause to be mailed three copies of the same to the Solicitor General, Department of Justice, Washington, D. C.

Robert G. Duncan

Robert G. Duncan

Supreme Court, U.S.
FILED
JAN 11 1983
ALEXANDER L. STEVAS
CLERK

No. 82-598

In the Supreme Court of the United States

OCTOBER TERM, 1982

IRA T. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the value of stolen property was properly aggregated so as to reach the $5,000 jurisdictional minimum under 18 U.S.C. 2314 and 2315.

2. Whether petitioner was prejudiced by the district court's refusal to charge the jury concerning the credibility of a drug addict witness.

3. Whether the district court properly refused to suppress stolen art objects seized from petitioner's home pursuant to a search warrant.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-598

IRA T. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The opinion of the court of appeals (Pet. App. A-1 to A-20) is reported at 692 F.2d 658.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1982. A petition for rehearing was denied on July 27, 1982 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed as of September 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on one count of violating 18 U.S.C. 2315 by receiving stolen goods that were a part of interstate commerce, and on one count of violating 18 U.S.C. 371, by conspiring to transport stolen goods in interstate

commerce, a violation of 18 U.S.C. 2314. Petitioner was sentenced to concurrent two-year terms of imprisonment on each count and was fined $10,000 on each count. The court of appeals affirmed. Pet. App. A-1 to A-20.

1. In 1974, petitioner met Gerrold Stevens and began purchasing clothes and art objects from him. Tr. 675-676. Petitioner subsequently met Stevens' half-brother, Marvin Gabb. Tr. 13, 683-684. Gabb was a shoplifter, specializing in shoplifting art objects. Stevens operated as a fence for Gabb and other shoplifters. Tr. 7, 12-13.

Gabb first met petitioner in December 1977, when Stevens brought petitioner to a motel room to examine articles that Gabb had stolen in Phoenix. At his first meeting with Gabb, petitioner purchased at least one art object. Tr. 18-21, 25-26.

During the summer of 1979 Gabb sold a piece of stolen Georgian silver directly to petitioner, by-passing Stevens.[1] This caused substantial friction between Gabb and Stevens, which resulted in Gabb's decision to sell his stolen goods directly rather than using Stevens as a fence. In January 1980 Gabb began selling stolen art objects to petitioner on a regular basis, beginning with the sale of several art objects that Gabb had stolen during a trip to Phoenix. Thereafter, through mid-September 1980, Gabb sold at least 70% of the art objects that he stole—more than 60 pieces—to petitioner. Petitioner paid Gabb approximately $2,000 a week. Petitioner and Gabb occasionally discussed the stolen nature of the art objects, and on at least two occasions petitioner suggested objects that Gabb should steal. Tr. 15-16, 26-29, 32-43.

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[1] The silver still had a price tag—$6,500—on it when petitioner purchased it from Gabb for $1,300. Tr. 32.

2. In August 1980 Gabb was arrested in St. Louis, Missouri, on a charge of shoplifting. Tr. 298-299. The investigation related to Gabb's arrest also caused law enforcement officials to obtain a search warrant for petitioner's home, which they executed on September 18, 1980. Tr. 506-509. According to one of the officers who participated in the search, petitioner's house "looked like a museum." Tr. 515. In addition to the items they seized, the officers photographed several art objects that were located in the house. Tr. 516. These photographs were then shown to dealers who had reported art thefts, who identified many of the photographed objects as having been stolen from them. Tr. 224, 282-283, 294, 346, 349-350, 417, 437-438, 542, 564, 631-632. A second search warrant was obtained and executed on October 9, 1980, as a result of which 96 additional art objects were seized. Tr. 559, 566.

ARGUMENT

1. Petitioner contends (Pet. 21-26) that the $5,000 minimum for federal jurisdiction over his offenses may not be satisfied by aggregating the value of the individual stolen art objects that he received. There is no merit to this claim.

The statutory scheme that imposes federal criminal sanctions for dealing in stolen property specifically provides (18 U.S.C. 2311) that "the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof." As this Court noted in *Schaffer* v. *United States*, 362 U.S. 511, 517 (1960), "[a] sensible reading of the statute properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated." Accord, *United States* v. *Tobin*, 576 F.2d 687, 693 (5th Cir. 1978); *United States* v. *Drebin*, 557 F.2d 1316, 1328 &

n.19-1329 (9th Cir. 1977); *United States* v. *Jones*, 432 F. Supp. 801, 802 (E.D. Pa. 1977), aff'd *sub. nom. United States* v. *Moore*, 571 F.2d 154 (3d Cir.), cert. denied, 435 U.S. 956 (1978). Petitioner does not dispute that the aggregate value of the items listed in the indictment is greatly in excess of $5,000. Pet. App. A-6. Hence, the jurisdictional minimum for application of 18 U.S.C. 2314 and 2315 was satisfied.

Petitioner asserts, however, that there was no "plan or agreement" between him and Gabb and that therefore each sale must be viewed as a separate transaction not subject to aggregation for purposes of the $5,000 jurisdictional amount. This assertion is belied by petitioner's conviction for conspiracy to transport stolen art objects in interstate commerce.[2] Gabb's testimony (Tr. 27-43) amply supports the finding of an agreement between petitioner and Gabb for the theft, interstate transportation, and delivery to petitioner of stolen art. Tr. 27-43.

Finally, petitioner's concern about "creeping federalism" (Pet. 25-26) is not apposite to his case. Even if the value of the stolen merchandise alleged in the indictment could not be aggregated, certain stolen items petitioner received were individually valued at more than $5,000—one stolen art object delivered to petitioner still bore a $6,500 price tag (see note 1, *supra*).

2. Petitioner argues (Pet. 26-30) that he was prejudiced by the district court's refusal to charge the jury concerning the credibility of a government witness who is a narcotics addict. This claim also lacks merit.

Gabb, the art thief who sold to petitioner, had been a heroin addict since 1956. He testified at trial that he

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[2] Although no co-conspirator was identified by name in the indictment, Gabb was alleged to have participated in three of the overt acts charged in the conspiracy count. Tr. 771-772. No other individual (apart from petitioner) was named in the indictment.

shoplifted in order to support his drug habit. He also stated that when he agreed to testify against petitioner he was given immunity for all non-violent crimes he had committed in the District of Kansas and was placed in the federal witness protection program. Tr. 4-12.[3] The district court instructed the jury generally concerning credibility. Tr. 790. In addition, the court specifically cautioned the jury concerning the special scrutiny that should be given to the testimony of a paid or immunized witness, or a witness who is an accomplice, or a convicted felon, each of which pertained to Gabb. Tr. 788-789.[4]

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[3] In addition, Gabb testified, federal officials had agreed to try to help him with respect to non-violent property crimes he had committed outside the District of Kansas if he would help recover the property. Tr. 4-5. Gabb also testified concerning prior convictions for which he had already served time. Tr. 8-9.

[4] Instruction Number 28 provided (Tr. 788-789):

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

Instruction Number 29 provided (Tr. 789):

> The testimony of a witness who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness' testimony has been affected by

The trial court declined, however, to give the additional instruction requested by petitioner concerning the special care with which the testimony of a narcotics addict should be considered (see Pet. 26-27). The court of appeals affirmed. It held (Pet. App. A-15) that although, "[a]s a general rule, prudence dictates the giving of an addict instruction whenever the prosecution has relied upon the testimony of a narcotics addict," petitioner was not prejudiced by the district court's failure to do so here because the other credibility instructions given by the court sufficiently alerted the jury to the special care and caution it should use in evaluating Gabb's testimony.

As the court below observed (Pet. App. A-11), several courts of appeals have spoken approvingly of the use of "addict-informant" instructions. See, e.g., *United States* v. *Hopkins*, 518 F.2d 152, 154-155 (3d Cir. 1975); *United States* v. *Lee*, 506 F.2d 111, 122 (D.C. Cir. 1974), cert. denied, 421 U.S. 1002 (1975); *Government of the Virgin Islands* v. *Hendricks*, 476 F.2d 776, 779-780 (3d Cir. 1973); *United States* v. *Collins*, 472 F.2d 1017, 1018-1019 (5th Cir. 1972), cert. denied, 411 U.S. 983 (1973); *United States* v. *Kinnard*, 465 F.2d 566, 569-572 (D.C. Cir. 1972); *United States* v. *Griffin*, 382 F.2d 823, 828-829 (6th Cir. 1967). Whether the failure to give such an instruction requires reversal, however, has been held to turn on whether the witness's testimony was corroborated and on whether other credibility instructions were given that sufficiently apprised the jury of the need to weigh the testimony carefully.

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interest, or by prejudice against a defendant.

Instruction Number 30 provided (Tr. 789):

> When it has been shown that a witness has previously been convicted of a felony, you are to determine his credibility and the weight to be given his testimony the same as you would the testimony of any other witness. The fact that a witness has been convicted of crime may be considered by you in determining what credit you should give him as a witness and what weight you will allow his testimony.

See *United States* v. *Hopkins*, *supra*, 518 F.2d at 154-155; *United States* v. *Gregorio*, 497 F.2d 1253, 1261-1263 (4th Cir.), cert. denied, 419 U.S. 1024 (1974); *Government of the Virgin Islands* v. *Hendricks*, *supra*, 476 F.2d at 779; *United States* v. *Collins*, *supra*, 472 F.2d at 1019; *United States* v. *Kinnard*, *supra*, 465 F.2d at 572; *United States* v. *Griffin*, *supra*, 382 F.2d at 828-829.

In petitioner's case, the testimony of the addict witness Gabb was amply corroborated by the stolen art objects that had been seized from petitioner's home. Moreover, the other credibility instructions given by the district court—concerning the special care that is to be employed in evaluating the testimony of an accomplice, an informant, or a convicted felon, as well as the general credibility instruction—were clearly sufficient to alert the jury to the caution with which it should receive Gabb's testimony.[5] In these circumstances, the court of appeals correctly ruled that petitioner suffered no prejudice from the district court's failure to give the requested addict witness instruction.[6]

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[5] In addition, the fact of Gabb's narcotics addiction, as well as his arrangements with the authorities and his prior convictions, were fully explored on both direct and cross examination (Tr. 4-12, 102-141). Contrary to petitioner's suggestion (Pet. 29-30), the lower federal courts have held that where the fact of addiction is brought out during testimony and where other credibility instructions alert the jury to the need for special care in evaluating the addict witness's testimony, the trial court's failure to give an additional instruction specifically concerning the credibility of an addict witness does not require reversal. See, e.g., *United States* v. *Hopkins*, *supra*, 518 F.2d at 154-155.

[6] Contrary to petitioner's assertion (Pet. 29), the decision in this case creates no conflict among the circuits that requires resolution by this Court. The court below *agreed* with the decisions on which petitioner relies (Pet. 28-29) that, "[a]s a general rule, prudence dictates the giving of an addict instruction whenever the prosecution has relied upon the testimony of a narcotics addict" (Pet. App. A-15). It merely held that in the par-

3. Petitioner finally contends (Pet. 31-34) that the district court erred in failing to suppress the stolen art objects seized from his home. There is no substance to this claim.

Petitioner's home was searched on two occasions, on September 18, 1980, and on October 9, 1980, both times pursuant to warrant. During the first search, a number of art objects not listed in the warrant were in plain view and were systematically photographed. When several of these items were later identified as stolen, they were seized pursuant to a second search warrant. Petitioner now complains (Pet. 33-34) that the inventory and photographing of the art objects during the first search was an impermissible general search that tainted the subsequent seizure of those items pursuant to the second warrant.

The district court and the court of appeals disposed of petitioner's suppression motion on the ground that it was made after the commencement of trial and therefore was untimely under Fed. R. Crim. P. 12(b)(3) and (f) (Pet. App. A-18 to A-20). As the court of appeals noted (*id.* at A-19), "the purpose of the rule requiring that motions to suppress be made prior to trial is to provide orderly proceeding during the trial of a case by eliminating from the trial 'disputes over police conduct not immediately relevant to the question of guilt.'" *Mesmer* v. *United States*, 405 F.2d 316, 318-319 (10th Cir. 1969), quoting *Jones* v. *United States*, 362 U.S. 257, 264 (1960). It is clear from the Rule itself and well settled by judicial interpretation that the failure to make a timely motion to suppress constitutes a waiver of the issue. *United States* v. *Scavo*, 593 F.2d 837, 844 (8th Cir. 1979); *United States* v. *Hare*, 589 F.2d 242,

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ticular circumstances of this case the failure to give such an instruction did not prejudice petitioner. The validity of that fact-bound determination clearly does not warrant this Court's intervention.

243 (5th Cir. 1979); *United States* v. *Bridwell*, 583 F.2d 1135, 1139-1140 (10th Cir. 1978); *United States* v. *Echols*, 577 F.2d 308, 311 (5th Cir. 1978); *United States* v. *Wood*, 550 F.2d 435, 439 (9th Cir. 1976); *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976). While the district court was empowered to find good cause for not holding petitioner to his waiver if such existed (see Fed. R. Crim. P. 12(f)), it did not do so, and the court of appeals agreed (Pet. App. A-20) that there was "no evidence that [petitioner] lacked the opportunity to make his motion in a timely manner." That concurrent, fact-bound determination does not warrant review by this Court.

In any event, there is no merit to petitioner's Fourth Amendment claim. Petitioner does not dispute that probable cause existed for the issuance of the first warrant. See also affidavit of James K. Weber, Special Agent, Federal Bureau of Investigation, in support of search warrant issued Sept. 17, 1980. Once inside petitioner's house, the officers were entitled to observe items, such as the art objects, that were in plain view. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). "Police officers are not required to ignore the significance of items in plain view even when the full import of the object cannot be positively ascertained without some examination." *United States* v. *Roberts*, 619 F.2d 379, 381 (5th Cir. 1980). See also *United States* v. *Berry*, 423 F.2d 142, 144 (10th Cir. 1970). Since there was a great likelihood that many of these items were also stolen, the officers would have been derelict in their duty had they not taken some measure to aid further investigation. The taking of photographs, which did not constitute a further search but merely a means of preserving the recollection of what was already in plain view, was surely reasonable in the circumstances.[7] Pe-

[7] Indeed, the facts known to the officers might well have justified an immediate seizure on the basis of the probability that most of the objects were stolen.

titioner does not, nor can he, claim that once the photographed items were identified as stolen, there did not exist probable cause in support of the issuance of the second warrant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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